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IN THE

Supreme Court of the United States

October Term, 1964

No. 796

AWARE, INC., a corporation, and
VINCENT W. HARTNETT,

Petitioners,

against

JOHN HENRY FAULK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LOUIS NIZER,
Counsel for Respondent.

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The "Questions Presented" by Petitioners Are Spurious

Petitioners' invocation (p. 2 *et seq.*) of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, utterly ignores all of the pertinent facts, as found by the New York courts and, for the most part, admitted on the trial. None of the requisites enunciated in that decision is present here:

(1) The respondent, as second vice-president of the New York Local Board of Directors of the American Federation of Television and Radio Artists (hereinafter simply termed "AFTRA"), was certainly not a "public official" — any more than an officer of a private corporation is.

(2) The petitioners herein were not engaged in criticism of respondent's "official conduct," under any stretch of

that concept, or, indeed, in any discussion of matters of public interest. They deliberately engaged in the most vicious form of private character assassination conceivable, for the sole, admitted purpose of destroying the respondent's livelihood, and thereby furthering their own corrupt interests (*vide infra*). For these two reasons, the New York Court of Appeals' decision that petitioners "enjoyed no such privilege under the Constitution of the United States" (14 N. Y. 2d 899; pet., p. 17) was clearly correct.

(3) Even if there had been such a privilege — "qualified" and, therefore, destructible by proof of "malice" (*New York Times Co.* v. *Sullivan, supra,* at 279-80) — the adjudicated and uncontradicted evidence of malice here was overwhelming, and far exceeded the "knowledge of falsity or reckless disregard" which the petition (pp. 34-37) asserts is required — and concedes is sufficient — to vitiate the privilege. Thus, in contradiction of petitioners' statement (p. 16) that "[t]he Appellate Division had only this to say on malice" — followed by a quotation from its opinion, which is alone sufficient to distinguish the *Sullivan* case — the language quoted is immediately preceded by the following:

> "He [plaintiff] conclusively established that the defendants planned to destroy his professional career through the use of the libelous publications directed to the places where they would do him the most harm. He proved that they succeeded in doing so."

Petitioners have also omitted the subsequent language of the opinion, which renders their entire petition a travesty:

> "He was professionally destroyed, his engagements were cancelled and he could not gain employment in his field despite every effort on his part.
>
> * * * So we have, as found by the jury and amply supported by the evidence a vicious libel, deliberately and maliciously planned and executed with devastating effect upon the plaintiff, all without a semblance

of justification." (19 App. Div. 2d 464, 476-68, pet., pp. 85-86)

The evidence and admissions of petitioners' viciousness, as well as their actual knowledge of falsity, will be briefly reviewed hereinbelow.

The only real "question presented" by this petition is whether the entire common law right of action for libel should be abolished—even in behalf of a private individual who is the victim of the most malicious and unjustified attack heretofore reported. The only freedom of expression involved was that of the respondent. The petition is, in reality, an attempt to subvert the very constitutional guarantees which it hypocritically invokes.

Statement of the Case

The "facts" selected by the petitioners are so inadequate and distorted as to render the case unrecognizable. Many of the salient facts are completely omitted, the others are misstated, and most of petitioners' assertions are utterly devoid of support in the record. In order, however, to spare the Court a detailed refutation, this brief will be confined to a concise summary of the pertinent facts, based almost entirely upon documents and admissions during the trial.

The "background" (pet., p. 6 *et seq.*) and the publication of Aware Publication 16.

During the period between 1953 and 1956, the New York local of AFTRA had fallen under the control of the two petitioners, Aware, Inc., and its researcher-writer and director Hartnett. They, were not members of the union at all (325-26; 5588)*. Nevertheless, they controlled its policies and intimidated its membership (543 *et seq.*, 2116 *et seq.*, 2298-301; Exs. BB. EE). Aware was a "self-

* Numbers and letters in parentheses refer to pages or exhibits in the Appellate Division record.

perpetuating group'' of vigilantes who engaged in the ''blacklisting'' of union members, and Hartnett earned a large income by reporting to networks, agencies and sponsors the alleged ''pro-Communist affiliations'' of entertainers and others employed on television and radio programs (pet., pp. 44-45).

In March 1955, the members of AFTRA, at a general membership meeting, girded up enough courage to oppose petitioners' tyranny and adopted, by a large majority, a resolution vigorously condemning the blacklisting activities of Aware and its ''interfering in the internal affairs of our union'' (Exs. 38, 39). On the insistence of the Aware-dominated board of directors, this resolution was submitted by referendum to the entire membership, with Aware-inspired propaganda urging its defeat, but the resolution was carried by an almost two-to-one vote (580, 585-86, 592).

This membership resolution was a clear mandate to designate a new slate of directors opposed to petitioners' practices (592-93, 2117-20, 2301). It led, inevitably, to the formation of the ''middle-of-the-road'' slate, which is the subject of the ''News Supplement to Membership Bulletin, Aware Publication 16'' (Ex. 41, pet., pp. 61-64, hereinafter termed the ''Aware Bulletin''), the principal libel in suit. The term ''middle-of-the-road'' clearly and accurately signified that this slate, headed by the prominent CBS commentator, Charles Collingwood, and including Garry Moore, Orson Bean and the respondent, was as strongly anti-Communist as it was anti-blacklisting (2158, 5473). It was elected by an overwhelming majority, in ''the largest vote which was ever recorded in AFTRA history'', and respondent was elected to a lower office, that of ''second vice-president'' (600-01).

The middle-of-the-road slate represented an obstacle to the tyrannical domination of the union by Aware and to the racketeering practices of Aware's ally and director,

Hartnett. Hartnett, who every day cleared or condemned the loyalty of television and radio personnel (without notice to them), received fees of from $5 per name for a nominal check to from $20 to $300 for a more detailed report, and $2 for a simple recheck (*e.g.*, 366 *et seq.*, 377, 380-82, 391, 404, 410, 894-95, 2939, 4899, 6496; Exs. 33, 58A, 58B, 58C). Although his prior earnings had been most meagre, Hartnett amassed during the several years of this employment, nearly $100,000 (Ex. 33). It was this "blood money" which Hartnett feared was jeopardized by the election of the middle-of-the-road slate.

Until respondent joined this slate, petitioners had never in any way even mentioned him. Thus, although Hartnett had written several of the "most comprehensive" listings of "persons with alleged Communist front participation", he had never referred to any of the activities falsely alleged in the libels in suit (*infra*) because he, admittedly, did not consider them "important" enough (835-38, 4671, 5540-48, 5550, 5543).

Directly after respondent's election on December 15, 1955, Aware's board of directors, including Hartnett, met and planned specific measures to terminate his career (Ex. 119; 4740 *et seq.*). Hartnett urged Aware to "reprint" certain references to respondent in the Daily Worker, adding "a few comments by Aware, and then send the copies to the [advertising] agencies" (Ex. 119; 4747)—upon which respondent's career and livelihood were dependent. The board of directors specifically instructed Hartnett "to investigate respondent's record" and "to set forth as much of Mr. Faulk's alleged pro-communist front record as [he] could" (4237-39).

In addition (and in refutation of petitioners' bland dismissal of "a conspiracy theory"—p. 13), co-defendant Johnson and his cohorts in Syracuse were specially invited to attend the next Aware membership meeting (*ibid.*;

Ex. 119). That meeting was held in January 1956, and the Aware Bulletin attacking respondent (Ex. 41) was announced and described (5863). Johnson's associate then and there stated that they would make use of the Bulletin (5864-65)—as indeed they did (see, *e.g.*, Exs. 35, 46B, 47).

It was decided to publish the article, not as an ordinary "membership bulletin" but as a "news supplement", so that it could be distributed not only to Aware's members, but also to its mailing list of about 2,000 names (pet., p. 9; Ex. 42; 4180-81). That mailing list, which was designed to reach every possible source of employment which respondent could hope for, included, *inter alia*, (1) every newspaper in New York, (2) every radio and television station, (3) a special copy to Dr. Frank Stanton, the President of the Columbia Broadcasting System, respondent's employer, (4) national advertising associations, (5) the leading advertising agencies, (6) the National Association of Retail Grocers (one of respondent's chief assets was his ability to sell supermarket items), (7) every major motion picture studio, (8) large commercial corporations engaged in extensive advertising, (9) all four actors' unions, (10) law enforcement agencies, including the F.B.I. and the New York City Police Department, (11) Congressmen and Senators, including the House Un-American Activities Committee and the Chairman of the Senate Internal Securities Committee, (12) leading patriotic and civic organizations, (13) various chambers of commerce, and (14) the leading magazines and columnists (Ex. 42; 19 App. Div. 2d 464, at 466, pet., pp. 82-91, at 84). At the trial petitioners admitted, euphemistically, that they "knew * * * [that the Bulletin] might affect the employment of John Henry Faulk" (4193), and that they "intend[ed] to influence the conduct of [its readers]" (4205; pet., p. 40).

The extreme malice manifested by petitioners.

It was demonstrated that the Bulletin, which was written by petitioner Hartnett and published by co-petitioner

Aware, Inc. (Ex. 41, pet., pp. 61-64) was a succession of lies from start to finish (5660-61).

Its charges that the middle-of-the-road slate did not openly and seriously oppose communism and that the respondent did not intend to perform his official duties in enforcing the Union's rules against communists were demonstrated to be false (Exs. 40, 68, 71, 812-13, 1785, 2043-44, 2168-70, 5472-75). Similarly, Hartnett admitted the falsity of the smear that the middle-of-the-road slate "was first reported by the Daily Worker" (pet., p. 62; 5206-10). He further admitted that he had falsely attributed to that publication a quotation commending the slate, which he had actually copied from the New York Herald Tribune (5517).

The Aware Bulletin then accuses the respondent personally of seven affiliations with Communist and Communist-front activities (924-26), the falsity of each of which was proven as a matter of law. In five of the seven instances, petitioners submitted not one iota of evidence that respondent had ever attended any activity or organization even remotely resembling the one referred to, and he had not (19 App. Div. 2d 464, at 468, pet., p. 86). In addition, in all seven instances, the petitioners egregiously distorted the nature of the function referred to, respondent's alleged connection therewith, and all the relevant surrounding circumstances, and they published their charges without any verification or honest documentation.

The instance now stressed by petitioners (pp. 15-16) is respondent's alleged appearance with an "identified Communist * * * under the auspices of the Independent Citizens Committee of the Arts, Sciences and Professions (officially designated a Communist front * * *)" (pet., p. 63). The following are the admitted facts:

Petitioners "deliberately and purposefully" omitted from their bulletin all of the material circumstances, in-

cluding that (1) the affair referred to was actually "A Salute to the United Nations on the occasion of the First Anniversary of the San Francisco Conference" (Ex. 53; 4600); (2) among the speakers were the Secretary General of the United Nations, the Secretary of State of the United States and the ministers of Great Britain, France and China; (3) the entire ceremony was broadcast over WCBS, which it, as respondent's employer, had asked him to attend, and it was co-sponsored by the American Bar Association, the YMCA and ten other, similar organizations; and (4) even the Independent Citizens Committee—the only sponsor mentioned—had never been "designated a Communist front" and was in fact, as petitioners conceded, of "miniscule" significance (Ex. 53; 4600-08, 6057).

Petitioners have the temerity to describe their report of this event as not a "falsification," but an honest selection of facts, in which:

> "The thrust of the item is still in no way different. One man's relevance is evidently another man's poison." (pet., p. 50)

To insist, as this petition does, that respondent's participation in so patriotic an activity justified petitioners' charge that he would betray his duties as an officer of AFTRA and, as the jury found, that he was pro-Communist or sympathetic with Communism (8027), is an effrontery. To urge that petitioners' admitted knowledge of these facts did not constitute "knowledge of the falsity" of their charge (pet., pp. 49-50) is an absurdity.

The extreme malice of all seven charges against respondent was aggravated even further by petitioners' admissions that they had no information whatsoever, even trivial or specious, against the plaintiff at any time subsequent to 1949 (5543-45)—seven years prior to their libelous Bulletin, and that such a lapse would, in any other case, have caused them "to forget about the whole thing" (5548); that they

had avidly checked the records of all the Congressional committees and no less than thirteen possible sources of information in the hope of unearthing any information adverse to the respondent, but found nothing against him (839, 4663, 5316, et seq., 5324, 5432-33); and that they had systematically omitted all of the many favorable and highly patriotic attributes of respondent's career, including his war-time enlistment despite his blindness in one eye (4680, 57-61), his numerous professional, patriotic and charitable activities, awards and honors (e.g., Exs. 10A, 10B, L), and the concededly "important fact that his broadcasts were solely an entertainment program without any political overtones" (4692-94).

Nor did petitioners disclose another, concededly "very important" fact: that all but one of respondent's seven alleged affiliations pre-dated the alleged "citation" of the organization involved, if any, so that respondent could not possibly have known, at the time of his alleged isolated contacts with those organizations, that they had even been commented on (4618-19, 4623, 4627-30, 4634-35, 5029, 6042, 6109, 7107; Ex AS). In short, the ancient, isolated alleged affiliations of respondent, so grossly distorted in the Bulletin, were not only false but were also, as petitioners well knew, devoid of all significance.

Even the petitioners were constrained to admit that "up to this moment * * * Mr. Faulk [has continued to be] a loyal and patriotic American" (4236). Nevertheless, Aware conceded that the whole purpose of its Bulletin "so far as Mr. Faulk was concerned was to have people who read Exhibit 41 [the Aware Bulletin] believe that he had pro-Communist affiliations" (4690). Could "actual malice" (pet., p. 33) be more clearly demonstrated than by these admissions, and by Aware's blunt acknowledgement that respondent's alleged affiliations "acquired significance [merely] because he was a candidate, a successful candidate for office," and that they refrained from making any charges against

"other people in AFTRA with much more substantial records" (4721)?

Even this petition concedes (p. 40):

> "Petitioners grant that there was no love lost between Faulk and them. They admit undertaking research to find out what would be damaging to Faulk, whose political views on control of AFTRA were so opposed to theirs. They wanted to see him out of AFTRA office. If what they uncovered in their research would also be unfavorable to Faulk in his job of making public broadcasts, that would not bother them."

Nor do even the foregoing admissions fully summarize the petitioners' deliberate and malicious campaign against respondent personally (19 App. Div. 2d at 467, pet., p. 85). On November 19, 1955, at the very height of the middle-of-the-road slate's campaign (847), petitioner Hartnett wrote the Chief Clerk of the House Committee on Un-American Activities, asserting and supplementing many of the scurrilous charges soon to be included in the Bulletin (Ex. 54)—for the evident purpose of soliciting the aid of that Committee in defeating what he described as the "Daily Worker"—supported union slate.

Eight days later, and still in the midst of the election campaign, Hartnett wrote to Young & Rubicam (Ex. 58A), which he knew was one of the largest advertising agencies in the country (5605) and placed the advertising for a number of sponsors on respondent's radio program (see Ex. 47). The only report in this eight page letter which Hartnett gave unsolicited and without charge (5211-12) was on "the co-leader of this ticket John Henry Faulk [who] has a significant Communist front record." He added, "I am afraid he [Faulk] is 'using' the liberals" (Ex. 58A, p. 2; 5603).

At the trial Hartnett admitted that such a letter would cause Young & Rubicam to "think twice in connection with

employing such a man'' (5606). He also admitted that he "had no evidence to back up a charge that he [respondent] was pro-Communist,'' and had "no knowledge of [respondent's] motivation'' (5459, 5672). He thus, admittedly, had full "knowledge of falsity'' (pet., p. 3) of his report and, moreover, he sent it for the acknowledged purpose of destroying respondent's career.

Hartnett carried his malice to the extent of informing a lieutenant in the New York City Police Department that respondent had "Communist front affiliations,'' and asked him for additional information, on his representation which he again admitted to be untrue—that the "middle-of-the-road slate was helping Communism'' (5769-78, 5472-75).

Thereafter, Hartnett wrote other letters regarding respondent to the Kudner Agency, "a leading advertising agency that employed [professional] artists'' (5616), and to the Borden Company (Exs. 58B, 58C)—both of whom, as well as Young & Rubicam, the recipient of the first letter, he admitted, "certainly placed great reliance on'' his personal reports (5611-12).

Furthermore, on May 7, 1956, the President of Grand Union Supermarkets wrote to petitioner's co-defendant putting him on notice of the false charges being circulated about the respondent (Ex. 99). That letter was immediately called to the attention of the petitioners (3349-51), and they assured their co-defendant that there was documentary support for all "the citations, at least as such'' (3354). Thereafter, on June 15, 1956, the petitioners were served with the summons and verified complaint in this action, formally notifying them that the allegations contained in their Bulletin were false.

Thereupon, instead of retracting the publication or even checking its accuracy, Aware, through its President, falsely asserted on a television program that everything in its Bulletin "was the truth and nothing but the truth''

and, indeed, that respondent had "admitted" its truth and had perjured himself in his verified complaint (Ex. 98). Petitioners also alleged the truth of the Bulletin three separate times, in each of their successive verified answers.

Subsequently, with knowledge that someone at WOR "had proposed hiring Mr. Faulk" (5759-61), Hartnett maliciously told an official there that respondent, who was then no longer a union officer, had "a record of affiliations with pro-Communist groups" (5761).

ARGUMENT

POINT I

Respondent was clearly not a "public official", under even the broadest definition of that term.

The respondent was not a public or government official in any sense. He was merely the second vice-president of the New York local of AFTRA. He served without compensation, while pursuing his full-time career as an entertainer.

Petitioners' ludicrous analogy is based upon generalizations which are not only *dehors* the record, but are factually untrue and legally irrelevant. AFTRA's New York local did not "in fact exercise economic control over the careers and livelihood" of its members, nor did it "influence * * * the content of television and radio * * * programs" or control any "vast reservoir of well-paying patronage" (pet., pp. 6, 7). Its economic control and public impact were less both in scope and significance, than those of most union locals, and far less than those of the private corporations which employed its members.

Respondent individually had very little power. He was the lowest ranking of the union officers mentioned in the Aware bulletin. Contrary to the petition, he had no voice whatsoever in matters of "collective bargaining" or "the

content of television or radio programs," and no "control over the careers of his fellow artists" (let alone his own career).

The administrative and executive functions of the union were performed not by actors like respondent, but by salaried, full-time employees, such as Kenneth Groot (cf. Ex. 70).

In the *New York Times* case, this Court equated "public official" with "government employee" (376 U. S. at 283, n. 23), and declared, as a reason for recognizing a privilege, that it "would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves" (at 282-83). Concededly, respondent had no such immunity for any statements he might make in the course of his duties as second vice-president of an AFTRA local. He enjoyed no privilege with respect to any attacks which he might make upon petioners, and to afford them a privilege would, in effect, grant them "an injustified preference over" him. It would also discriminate unfairly—and in respondent's case, absurdly—against labor unions.

None of the authorities cited by petitioners has the slightest resemblance hereto. No public official was even indirectly involved in either side of the AFTRA election controversy which gave rise to the libelous bulletin. Furthermore, petitioners were not members of the union at all (*supra*, p. 3), and therefore were not, so to speak, respondent's constituents.

The intra-local election had no more public significance than any contested election of directors or officers of a private corporation. Such corporation might, in fact, bargain collectively with the AFTRA local; yet who would claim that its officers—and particularly a second vice-president, who was not a participant in the bargaining—were "public officials," within the *New York Times* doctrine?

In point of fact, respondent was no more a public figure than most other private citizens. The only "public interest" which the election controversy engendered was caused by the excesses, tyranny and racketeering practices of these petitioners. They seek a privilege because of the notoriety which resulted from their own evil.*

As Mr. Justice Goldberg stated in his concurring opinion in the *New York Times* case:

> "Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment" (376 U. S. at 301-02).

Similarly, in this Court's other decision relied upon by petitioners, *Garrison* v. *Louisiana*, 85 S. Ct. 209, 215, n. 8, it was observed:

> "We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discreet area of purely private libels."

Since the *Garrison* decision, this Court declined, on two occasions, to consider whether it would extend the concept of "public officials" to persons having more public prominence or responsibility than respondent. In both *Cepeda* v. *Cowles Magazines & Broadcasting, Inc.*, 328 F.2d 869 (9th Cir.), *cert. denied*, 85 S. Ct. 51 (1964), where the successful plaintiff was a nationally prominent professional baseball player, and *Reiling* v. *Loftsgaarden*, 126 N. W. 2d 154, *cert. denied*, 85 S. Ct. 33 (1964), where plaintiff was the village attorney, this Court refused to grant certiorari.

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* The report, mentioned by petitioners (pp. 57-58), that the late President Kennedy hailed, and the late Senator Kefauver "rejoiced in," the decision in favor of the respondent, certainly did not render him a "public official."

However, the New York courts, in *Dempsey* v. *Time, Inc.*, 43 Misc. 2d 754, 252 N. Y. S. 2d 186 (Sup. Ct.), *aff'd without opinion*, N. Y. L. J. Nov. 20, 1964, p. 15, col. 6 (App. Div. 1st Dep't), did pass upon a similar question. There the plaintiff was the former heavyweight boxing champion of the world, whose name and identity were household words. The court nevertheless held:

> "This Court is not prepared to hold that because of the mere fact that one is a public individual, he may be exposed to naked libel * * * ." 43 Misc. 2d at 757, 252 N. Y. S. 2d at 189.

See also, *Harper* v. *National Review*, 33 U. S. L. Week 2341 (N. Y. Sup. Ct.).

In *Pauling* v. *News Syndicate Co.*, 335 F.2d 659 (2d Cir.), *cert. denied*, 33 U. S. L. Week 3245, cited petitioners (pp. 25, 52), the Court of Appeals in what is clearly a dictum, stated that the *New York Times* rationale might be applicable to the plaintiff therein because of a peculiar circumstance, not here present. It felt that justice might afford a reciprocal privilege to the defendant newspaper, because such a privilege would apply to the printing of the plaintiff's libelous charges against "a member of the Atomic Energy Commission" and a "United States Senator" (335 F.2d at 671). Clearly, the instant respondent enjoyed no such privilege with respect to any libelous statements he might have made concerning the petitioners, and neither party in any way criticized any public or government official.

POINT II

The libelous publications did not "relate to [respondent's] official conduct," nor, indeed, were they expressions regarding matters of public interest.

As petitioners concede (p. 2), nothing in the libelous publications criticized respondent for any of his acts as a union officer. As hereinabove (p. 5) shown, the bulletin was planned immediately after respondent's election and prior to his taking office. As the jury and the Appellate Division clearly found, the entire purpose of the bulletin was not to question respondent's official performance, or even his suitability for office, but "to destroy his professional career" and to "poison * * * the well-springs of his professional and economic existence"—which they did "with deadly effect" (19 App. Div. 2d 464, at 467, pet., pp. 82-91, at 85).

Neither the Aware Bulletin nor the other publications above referred to were sent to the union membership, which alone was in a position to redress any grievance affecting respondent's conduct or suitability. Instead, they were sent only to persons who were in a position to destroy respondent's economic career and livelihood (see Ex. 42; p. 6, *supra*).

Not only were the libelous publications not discussion of matters of public interest, but they were not genuine discussion at all. They were sheer coercion. That coercion was effected by their circulation among respondent's employers and prospective employers, by the use of a blacklist, then so prevalent in radio and television, and by threats of economic boycott by petitioner's co-conspirator, Laurence A. Johnson, of Syracuse, who, in petitioners' own language (p. 4), was the owner of "a number of supermarkets in Syracuse [and who] was active in opposing the employment of entertainers he suspected of Communist sympathies" (see Exs. 35, 46A, 46B, 47; 2341-47, 2410-15,

3605-7, 6774, 6185-96). The uncontradicted evidence showed that Johnson, in pursuance of his conspiracy with the petitioners against the respondent, personally circulated the Aware Bulletin, as well as even more insidious letters, expressly alleged in the complaint (pet., pp. 108, 118-30), among all of the sponsors of respondent's radio program, and threatened them with an economic boycott if they continued to employ the respondent (see references at top of page).

Applicable hereto, therefore, is the language of Mr. Justice Douglas in *Garrison* v. *Louisiana*, 85 S. Ct. 209, 219, quoting from *Roth* v. *United States*, 354 U. S. 476, at 514:

> " 'Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.' "

POINT III

Even assuming that petitioners' libels were privileged, that privilege was vitiated by their extreme malice.

As clearly demonstrated in the Statement of the Case hereinabove, petitioners manifested malice in every form and in the highest degree. Quoting again from *Garrison* v. *Louisiana*, *supra* (which applies *a fortiori* since it involved criminal libel):

> "Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. * * * ' Chaplinsky v. New Hampshire, 315 U. S. 568, 572, 86 L. ed. 1031, 1035, 62 S. Ct. 766. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." 85 S. Ct. at 216.

Moreover, these petitioners engaged not merely in "calculated falsehood," but also in premeditated character assassination, such as no one other than they would have the temerity to urge did not constitute "actual malice."

CONCLUSION

This petition is a perversion of the *New York Times* doctrine and a subversion of the very rights which are protected by it. It should be denied.

Respectfully submitted,

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Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
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NOTE

Although the Petition in this case was filed on the Appellate Docket, it was originally prepared for filing on the Miscellaneous Docket under Rule 53, being typewritten in accordance with Rule 47 (as explained in motions and affidavit accompanying the Petition). In view of Respondent having printed his opposing Brief, this Reply is also printed, with Petitioners' Counsel, not Petitioners, having contributed the cost of printing.

IN THE

Supreme Court of the United States

October Term, 1964

No. 796

AWARE, INC., a corporation, and
VINCENT W. HARTNETT,

Petitioners,

v.

JOHN HENRY FAULK,

Respondent.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

When damages in any libel case aggregate $550,000, and a trial judge can solemnly justify a jury verdict of $3,500,000, freedom of speech itself is at stake.

When human words can cost so much the courts can become instruments of oppression

Respondent has said nothing about the electrifying effect of this case on the public. Electrifying is used advisedly because for some the effect of this, the father case[1] of

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[1] The grandfather case was *Reynolds* v. *Pegler*, 223 F. 2d 429 (2d Cir.), *cert. denied*, 350 U. S. 846 (1955), in which the $175,001 aggregate award was then and until *New York Times Co.* v. *Sullivan*, by far the largest libel judgment in history. The Alabama Supreme Court may well have had the $3,500,000 judgment entered in this case in July, 1962, in mind, when later that summer it affirmed the *Sullivan* trial court's judgment of $500,000, 273 Ala. 657, 144 So. 2d 25 (1962).

million-dollar libel damages, has been to provide a source of riches and public amusement out of the controversies of others. A common-law remedy used rather occasionally to yield up to $20,000 or $30,000 in damages has now become for the libel bar richly worth a lawyer's wiles.

In addition to the political and public cases described in the Petition (pp. 58-59) as both threatening and burdening free speech, one magazine alone, *The Saturday Evening Post,* which now considers itself a "sophisticated muckraker", is faced with the crushing burden of defending ten "public interest" million-dollar law suits.[2] Some of these law suits are political, some may just be for pub-

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[2] "Public Interest" Libel Suits Pending Against Curtis Publishing Co. (list supplied by counsel for Curtis except for *Butts*)

1. *Butts* v. *Curtis Publishing Company,* 225 F. Supp. 916 (N. D. Ga. 1964), *appeal docketed,* No. 21,491, 5th Cir., Aug., 1964 (plaintiff, former athletic director and former football coach of University of Georgia, a state university, and also former president of American Football Coaches Ass'n, won a verdict of $60,000 compensatory and $3,000,000 punitive damages [latter reduced to $400,000 by trial judge] for magazine article accusing him of giving Georgia's plays to University of Alabama's football coach).

2. *Marlon Brando* v. *Curtis*—Superior Court, Los Angeles County, California, No. 811263; filed January 4, 1963; damages claimed $5,000,000; plaintiff a well known movie actor.

3. *A. Henry Silver* v. *Curtis*—Superior Court, Los Angeles County, California; No. 816068; filed March 29, 1963; damages claimed $1,000,000 punitive; plaintiff a "marriage counselor."

4. *Daniel Fignole* v. *Curtis*—U.S.D.C, Southern District of New York 63 Civ. 1788; filed June 18, 1963; damages claimed $1,000,000 general, $1,000,000 punitive; plaintiff a candidate for office in Haiti.

5. *Colonel T. B. Birdsong, et al.* v. *Curtis*—USDC, Northern District of Alabama, C.A. 63-545; filed November 1, 1963; damages claimed $1,000,000 general, $1,000,000 punitive; amended 10/14/64 to ask $500,000 compensatory, $500,000 punitive; not clear whether this is in addition to original amount claimed; plaintiffs are commanding officer of the state police and 13 state policemen on duty at the University of Mississippi during civil rights fracas of 1962.

6. *Diapulse Corporation of America* v. *Curtis*—USDC, Southern District of New York, 63 Civ. 3205; filed 1963; damages claimed $2,500,000 compensatory, $500,000 punitive; plaintiff producer of a diathermy machine claimed to cure arthritis.

(Continued on following page)

licity, but all involve matters of public concern. All were started after the $3,500,000 jury verdict in this case was confirmed by the trial judge in July, 1962 (35 Misc. 2d 302, 231 N. Y. S. 2d 270) (Petition, Appendix B, pp. 92-105), though before the decision in *New York Times Co. v. Sullivan*. The first of these offspring to reach a verdict, the *Butts* case, n. 2 *supra*, merely reinforces the possibilities of wealth in going after big libel judgments.

Even if these cases can eventually be fought and for the most part kept within bounds, they involve vast expenditures of time and funds by defendants. They clog the courts and distort their processes. They emphasize the deterrence, not the encouragement of free speech.

The threat of huge libel verdicts will mute the voice of the opinionated

Far worse than the burden on courts and mass-publisher defendants, however, is the effect on the politically opinionated. They are almost never persons with vast publishing facilities or the ability to spread the risk by insurance or by treating damages as a tax-deductible cost of doing business.

(Continued from preceding page)

7. *John Grayson* v. *Curtis*—Superior Court of King County, Washington, No. 612583; filed December 5, 1963; damages claimed $300,000; plaintiff a basketball coach.

8. *Lillian Reis Corabi* v. *Curtis*—Court of Common Pleas No. 1, Philadelphia County, December Term 1963, No. 1961; filed January 10, 1964; damages claimed on libel count (there are other counts) "in excess of $10,000 compensatory," $400,000 punitive. Plaintiff a well-known night club entertainer and co-defendant in sensational robbery case. Convicted since article.

9. *Dewey T. Colvard* v. *Curtis*—USDC, Northern District of Alabama, C.A. 64-140; filed February 26, 1964; damages claimed $3,000,000 compensatory and punitive. Plaintiff the Sheriff of Etowah County, Alabama. Article dealt with civil rights demonstrations.

10. *William C. Newberg* v. *Curtis*—USDC, Eastern District of Michigan, C.A. 25990; damages claimed $2,000,000; plaintiff ousted president of Chrysler Corporation.

For them the threat is greater. They can, as Petitioners, lose everything. Judgments against them cannot be washed away in bankruptcy. Their damages stand until they die or flee the country. The oppression is even greater in the political case since in income garnishee proceedings a defendant's political enemy may regularly learn the sources of his income from political sources. Even the XIII Amendment cannot gain him manumission.

Even rich men cannot dependably protect themselves. Predictably, at least one insurance company has risen to the need and offers an umbrella policy of $1,000,000 libel and slander protection for three years for $207.00, though one is unlikely to get it without considerable other insurance coverage. Some large corporations now require their directors to have it. The fallacy is that most directors of large corporations habitually avoid controversy and do not need coverage, and one can surmise that an insured who is sued for speaking out will not be allowed to renew.

The difficulty is even worse for those not in the mainstream of political thinking, whether rich or poor, and on whom a test of relevance, as here, is imposed. One ensconced in the mainstream because it is congenial, profitable, or to him philosophically correct will be able to view the extremes and sense the bounds beyond which he cannot go in political characterization without facing a suit for libel. The threat of huge damages therefore weighs little on him. One who is near an end of the political spectrum, however, may genuinely view all between him and the other extreme as in one lump. Yet if he says so, he may face huge damages in libel. Unless the First Amendment intervenes, political discussion will become sterile, with those on the edges of the extreme currently out of fashion afraid to speak out as they think—worse, only those of that extreme who are less sensitive or aware will speak and dialogue will fall to a lowest common denominator rather than being robust and full.

II.

The First Amendment privileges Petitioners' intrinsically political utterances concerning Respondent, who was both an active, elected union official exercising delegated government power and an entertainer whose relationship to them is obligatory in view of his regularly broadcasting over the public airwaves.

The major theme of Respondent's Brief is that this case involves a purely private libel visited upon him for his union activities, with which Petitioners had no right to be concerned, and that Petitioners had no right to communicate their utterances to his present and prospective broadcasting employers.

What could be more public than utterances concerning issues of communism? Who could be more public than one enabled by a government-fostered broadcasting monopoly to benefit himself by appearing on the public's airwaves? Who should be more subject to criticism than one who wields governmentally granted powers in his capacity as an active, high official of a union controlling the labor supply for national broadcasting?

The utterances had to do with Respondent's suitability to be such a union officer with duties in which the public has an interest. A reading of the whole *News Supplement*, or any part of it (Petition, Appendix A, pp. 61-64), makes this clear. Respondent's attitude towards communism, a public matter, was in issue. Respondent was not accused of something private, such as committing adultery or having a loathsome disease or writing bad checks. He was not even accused of something which might affect his public role of broadcasting on the public airwaves, such as taking payola, habitual lateness or being drunk on a program. The only charge was an inherently political one, with which every member of the public may legitimately be concerned, and a subject concerning which members of the public

should be entitled to communicate about with those enjoying power over them.

To set at rest Respondent's contention that Petitioners are generalizi[ng] *dehors* the record concerning AFTRA and Respondent' powers (Brief, p. 12), the Court need only refer to the complaint, Article Tenth (Petition, Appendix B, p. 110): "common knowledge" that Respondent had to comply with "law" (*i.e.,* NLRA) and sign a non-communist affidavit, when he became an AFTRA officer; the opening statement at the trial by counsel for Respondent: "All actors and actresses must belong to an organization called AFTRA"; and similar statements (R. b78 *et seq.*) Even a children's reference work, sold door-to-door, gives similar "common knowledge":

> "AMERICAN FEDERATION OF TELEVISION ARTISTS, a labor union affiliated with the AFL-CIO. Its membership of 12,000 includes most of the professional radio and television performers in the United States. AFTRA sets a minimum pay-scale for all appearances or performances within its jurisdiction. In most cities, a radio or television performer must either be a member of the union or get its special permission to perform. Its headquarters are in New York City." I NEW STANDARD ENCYCLOPEDIA A-222 (Chicago, 1962)

Moreover, Petitioners went into these same points of union power and Respondent's role in the Court of Appeals (Court of Appeals Brief, pp. II—a-m; Reply, pp. 12-20; Brief on Motion for Reargument, pp. 3-5), and Respondent in no way objected to them in his Brief or Affidavit in Opposition there.

To say that Respondent, an active, elected and high official of the AFTRA union which exercises control over broadcasting throughout the nation as a result of a delegation to it by the NLRA and state law of compulsory powers over the supply of labor is not subject to the "public official" privilege under *New York Times Co.* v. *Sullivan* is to put form over substance and to ignore the pervasive growth in power and benefits of the public sector

Despite his role as the active, elected second vice-president (and thus third highest official) of the New York local board (with jurisdiction over all "live" local and national broadcasting emanating from the Greater New York heart of television and radio in the United States), the major subdivision of AFTRA, enjoying powers of compulsion under Federal and state law, Respondent puts form over substance in denying that he is subject to the *New York Times Co.* v. *Sullivan* rationale.

Respondent was the prime mover in establishing the ticket which put him into high union office, whether he was paid or not. He was responsible for the proper exercise of the powers delegated by government, regardless of whether union employees did the day-to-day work. He was active.

He contends that despite possessing these government-delegated powers, the public has no privilege in criticizing him or inquiring into his suitability for office. His reason is that he had no privilege to criticize members of the public, thus urging that the *New York Times Co.* v. *Sullivan* privilege was based solely on a reciprocity doctrine (Brief, p. 13), citing *Pauling* v. *News-Syndicate Co.*, 355 F. 2d 659 (2d Cir.), *cert. denied*, 33 U. S. L. WEEK 3245 (U. S. Jan. 18, 1965) (Brief, p. 15) for the same argument.

Petitioners submit that *New York Times Co.* v. *Sullivan* protection is based on something more than a reciprocity doctrine permitting citizens to criticize those traditional governmental officials who might criticize them. Any person or "official" wielding government powers is everybody's

property and the right to criticize him should be regardless of whether he is privileged or not; the ordinary citizen is simply not everybody's property. A cat may look at a king.

Petitioners suggest that the true test of the *New York Times Co.* v. *Sullivan* privilege under the First Amendment is the obligatory nature as to every one of the official's powers. It should not be his title, nor exercise of a traditional function of government, nor sovereign immunity, but his powers which govern.

The obligatory right to impose duties on others is the only test which is broad enough to make *New York Times Co.* v. *Sullivan* consistent with the traditional scope of extent of privilege. Earlier notions of privilege were based on sovereign immunity, which Petitioners contend is hardly a suitable test in a democratic society. Such a test would even exclude the municipal corporation of *New York Times Co.* v. *Sullivan.*

The privilege began coterminous with the immunity of the sovereign. Originally the king alone, but later his barons and commons and courts, and eventually his high officers of state came within the privilege since within the immunity. One may suppose that the outer reach of the privilege included the enforcers of the sovereign's peace in his counties. They needed it to govern effectively.

Where does this leave the sovereign's creatures? Until *New York Times Co.* v. *Sullivan,* the official of a town or city enjoying powers under a limited charter was by no means assured of a privilege, except by analogy to the immunity of officers of counties (which were merely subdivisions of the sovereign), because such creatures were not themselves sovereign. Since *New York Times Co.* v. *Sullivan,* whether there is sovereign immunity to justify it or not, the privilege may well extend even to the mayor who is lord over only a road and sewerage system for a thousand souls.

To privilege critics of such an official (however his privilege is justified) yet not to recognize the vast new

delegations of power in this century to other persons and bodies to compel people to do things is to put form over substance.

As pointed out in the petition (pp. 18-23), an NLRA union official exerts great obligatory powers derived from government: he may compel employers to bargain exclusively with him; he may compel persons to join his union; he may tax them for support of the union; he enjoys a monopoly based on government power which permits him to impose duties on others. (This is quite different from the power of an officer of an ordinary private business corporation, which though a creature of the sovereign, lacks this power to impose duties on others.) When the actual powers over broadcasting derived from such an obligatory governmental power base become as great as those which AFTRA's officers can exert over national broadcasting, they should be as subject to public criticism as was Commissioner Sullivan.

Petitioners as members of the public (even disregarding the fact that a quarter of the members of Petitioner Aware were members of AFTRA) should thus be entitled to criticize Respondent under the *New York Times Co.* v. *Sullivan* privilege, just as the *New York Times* itself was permitted to criticize Commissioner Sullivan, though the *Times* was published almost a thousand miles away.

A union official enjoying delegated governmental powers who is also a regular entertainer in broadcasting, is by virtue of enjoying a government-imposed monopoly of the public airways (to his benefit) peculiarly subject to public criticism within the *New York Times Co.* v. *Sullivan* rationale

Respondent makes much of the fact that the industry-wide recipients of the *News Supplement* included "every possible source of employment which respondent could hope for" (Brief, p. 6). (For that matter, it also included every medium for communicating from the outside with AFTRA

members who could vote to re-elect Respondent that year). He suggests (and this was concurred in by the courts below) that this was wrongful, perhaps on the theory that it was irrelevant to criticize his union role to employers, or on the ground that it was an interference with advantageous relations. He also suggests that it was indicative of malice, in the old sense of that term as defined before *New York Times Co.* v. *Sullivan.*

Respondent ignores the fact that he was in an obligatory speaking position *vis-a-vis* the public. Radio is a public utility and monopoly. The government of the people of which Petitioners were a part created this monopoly, meaning that on weekdays from 5:05 to 6 P.M. WCBS in the New York area could force Respondent's words on them, if they wanted to hear anyone at 880 on the dial.

No one, on the other hand, was compelled to go to Toledo, Ohio, to buy a ticket and thereby become a private licensee to witness Jack Dempsey's 1919 "loaded gloves" fight with Jess Willard, see *Dempsey* v. *Time, Inc.,* 43 Misc. 2d 754, 252 N. Y. S. 2d 186, (Sup. Ct., N. Y. Co., Spec. & Trial Term) *aff'd without opinion,* 22 App Div. 2d 854, (1st Dep't 1964) (Brief, p. 15). Nor was one compelled to go to a private ball park to watch Orlando Cepeda of the San Francisco Giants. See *Cowles Magazine & Broadcasting, Inc.* v. *Cepeda,* 328 F. 2d 869 (9th Cir.), *cert. denied,* 379 U. S. 844, 85 S. Ct. 51, 13 L. Ed. 2d 50 (1964) (Brief, p. 14). Neither man by his activity, which people voluntarily paid to see, was in a position to influence the conduct (and rights) of other people.

One could not, however, avoid the Respondent even by not buying Libby's tomato juice, Pall Mall cigarettes of the American Tobacco Company, or Rheingold beer (Amended Complaint, pars. 16 and 23; Petition, Appendix B, pp. 111, 115). He was there, and Beethoven was not, and a patent-medicine show was not, and no other station was allowed nearby on the dial. He was there because Federal governmental power permitted WCBS to force him onto the public

airwaves. If his salary was high, it is because government permitted WCBS' monopoly to bring in vast revenues.

What is the remedy of Petitioners? Are they restricted to complaining to the FCC if they dislike such a compulsory entertainer, or to voting for a new congressman or president if they do not like the use made of their airwaves? Thus far in this case, the courts below imply that is about all they can do.

Petitioners contend that this is error, that the First Amendment gives them the right to complain to anyone who will listen about any aspect of the public's airwaves and their users. They urge that the First Amendment recognizes no degrees of relevance and they rightfully might for any reason talk or write to Respondent's present and prospective employers, advertisers or broadcasters about anything they wished concerning who should be forced on them over those airwaves.

Petitioners concede that Respondent had a First Amendment right to be controversial about them in his union activities. They claim, however, that they too have a First Amendment right to complain to Respondent's broadcasters about his union activities against them. A broadcaster could laugh off their complaints or could ask Respondent to tone down his activities.

If he went further and fired Respondent, as claimed in this case (and Petitioners have consistently denied that they were the cause of Respondent's losing his job a year and a half after the *News Supplement* was issued) the fault is not Petitioners'. It is the Federal government which as early as 1912, limited the number of stations and their hours (in some places there may only be one receivable channel), giving some power (signal strength) only to be heard near and some afar, and which has made it possible for some licensees like WCBS to amass riches and pay high salaries to persons like Respondent.

If this government-imposed and fostered scarcity makes it desirable for licensees to employ only non-controversial

entertainers, lest they lose some of their riches by losing part of their forced audience, this is Government's policy. If there were twice as many stations, Respondent's job might have been ten times as secure but paid a third as much, again as a result of government policy. Petitioners should not be silenced to protect the job tightrope government has imposed on broadcasting entertainers.

Petitioners therefore contend that the First Amendment vindicated their right to criticize Respondent to employers, or to any others of the *News Supplement* recipients (Brief, p. 6) who stood to benefit from the governmentally-imposed monopol. in broadcasting, or to any other member of the public.

III.

The New York courts' misapplication of tests of "actual malice" (old style) to Petitioners' intrinsically political utterances instead of this Court's test of "actual malice" (new style) as laid down in *New York Times Co.* v. *Sullivan* (actual knowledge of falsity or utter recklessness) violates Petitioners' rights of freedom of speech and the press.

Respondent's minor theme throughout his Brief is that Petitioners' conduct reeked of malice and therefore the *New York Times Co.* v. *Sullivan* privilege which they claim should be defeated.

Petitioners contend that the courts below did not apply the test of "actual malice" required by *New York Times Co.* v. *Sullivan.* There was no showing that Petitioners met the two key standards that case calls for: knowledge of falsity or utter recklessness. Instead, there was general talk in varying degrees of other things Petitioners might have done to other people (e.g., "blacklisting"); talk of other persons not parties to the case who mostly did not even discuss the case (e.g., Kim Hunter); the implication that Petitioner Hartnett, by profession a research consultant, had a financial motive in opposing Respondent, who

opposed him; talk of how public Petitioners had made their utterances (i.e. to employers); and even argument that the UN dinner (Petition, pp. 15-16, 49-51, 68-72) was misrepresented in the *News Supplement* (Petition, p. 63).

Pejoratives and Prejudice—give a dog a bad name

Throughout this case, the complaint, the press release of the same date (Exh. J, in evidence, R. 1199), Respondent's book and other statements on this case, press comment, book reviews, commentators, the courts below, all have emphasized the word "malice." One might call this the "big characterization" technique. As pointed out in the petition, the feeling in liberal New York about Petitioners' anti-communist views and activities in connection with broadcasting (characterized as "blacklisting") was as negative as the *New York Times'* views on segregation in white Alabama.

Petitioners contend that the characterizations so often used in this case ("extreme malice," "private character assassination," "corrupt interests," "travesty," "most malicious and unjustified attack heretofore reported," "attempt to subvert," "intimidated," "vigilantes," "tyranny," "blood money," "succession of lies," "smear," "temerity," "effrontery," "ludicrous analogy," "excesses," "sheer coercion," "blacklist," "perversion," "subversion," "vicious," "hypocritically," "racketeering"—all terms used in the Brief) may well have influenced the courts below and have strong powers of suggestion but add nothing to an analysis of this case. Respondent's publisher has even taken to using such terms in advertising "Fear on Trial," Respondent's book on this case. See large ad, "the discovery of an American hero," with testimonials, New York Times, Jan. 26, 1965, p. 35. cols. 6-8.

"Deliberate" — a word adding nothing to the case

An additional theme of Respondent is that Petitioners' acts were not reckless but were "deliberate," This, however, is a characteristic of the law of libel itself. It adds

nothing to say a libellor was deliberate. All alleged libellors are deemed to be deliberate in their actions. They deliberately publish the utterances in question. Even in *New York Times Co.* v. *Sullivan,* the *Times* deliberately printed the advertisement with its accusations of evil, though believing them true. But for that decision there would have been a "deliberate" group libel of "they," even if not of Commissioner Sullivan. It begs the question, however, for Respondent to say that "deliberate" adds anything to this case.

"Falsity" — a misleading word

On the other hand, Respondent's use of the word "falsity" (in referring to the seven "affiliations with Communist and Communist-front activities" charged to Respondent in the *News Supplement,* Brief, p. 7) is quite misleading. "Falsity" was never proven, merely being presumed from failure to prove the truth that Respondent did everything the seven documents (Petition, Appendix B, pp. 65-76; discussed, pp. 9-12, 34-38, 49-53) said he did or was to do. The word is harmful, even being used uncritically (in its related form "false") in the precis of this case in 33 U. S. L. WEEK 3248, January 19, 1965.

Moreover, the true test under *New York Times Co.* v. *Sullivan* is not even failure to prove truth, but instead knowledge of falsity or utter recklessness.

"Blacklisting" — trial of the issue of whether Columbus discovered America

Half the trial, the entire motivation of this case, and almost all press comment had nothing to do with libel. (See Petition, pp. 40-44.) As Respondent pointed out in his press release, multigraphed in his counsel's office and distributed the day the complaint was served (Exh. J, in evidence R. 1199), he was after "blacklisting." So said counsel (opening statement R. b. 113-4).

Despite efforts to have "blacklisting" defined, always rebuffed by the trial judge, testimony as to undefined

"blacklisting" ran to some 4,000 pages, supposedly to give a background of Petitioners' "malice." Most of the testimony was a general outcry against spectres under the bed, by persons in an industry noted for the scarcity of jobs and receptive to any excuse for not getting them. Tears ran when David Susskind told the story of the unidentified little girl who was "blacklisted" because her parents were supposed to be controversial (R. 419). Indignation was felt when Garry Moore read a newspaper article reciting the plight of the unidentified acrobat "blacklisted," though he never said anything on stage (R. 773). Petitioners were linked to neither. Laughter, however, accompanied the revelation that Petitioner Hartnett had once given an opinion on "Santa Claus" (R. 6497-6499), though a well-known model used that name (R. 6498).

Had the question of whether Columbus discovered America been made the issue, it could not have been less relevant to a fair trial of libel. Had the issue of whether Eichmann was guilty been injected, it could not have been more damaging (and in conflict with this Court's test of what constitutes "actual malice"). That the toy sailboats of "tiny malice" (all old style) floated on top of this tidal wave of irrelevance could not be distinguished by the jury is conclusively demonstrated by the $3,500,000 verdict. Even the trial judge, who had opened the floodgates, let himself be carried away by it when he confirmed the verdict.

"Extreme malice" (Brief, pp. 6-12) as not even tiny malice by *New York Times Co.* v. *Sullivan* standards

Aside from the pejoratives, misleading words adding nothing to the cause of action ("falsity" and "deliberate"), the irrelevant issue ("blacklisting"), and the question of whether Petitioners had a proper interest in communicating with the whole industry including employers, Respondent has not shown that Petitioners had knowledge of falsity or were guilty of utter recklessness.

In discussing the *News Supplement* (Brief, pp. 6-9), Respondent contends that it was "demonstrated" that it

was a "succession of lies", ignoring the *News Supplement's* documentary base and other matters known to Petitioners, as well as Respondent's admitted attendance at functions of three of the seven organizations with which he was linked by the *News Supplement* (Petition, pp. 9-12, 34-36, 52-53, Appendix B, pp. 65-76). All Respondent means is that Petitioners did not meet the erroneous test of proving the truth of the seven matters pointed out by the *News Supplement*, a test in conflict with that imposed by *New York Times Co.* v. *Sullivan*.

As for the UN Dinner "falsification" (Brief, p. 8) (discussed more fully in Petition, pp. 49-51) and the "omission" of "all of the many favorable and highly patriotic attributes of respondent's career" (Brief, p. 9), since when have those in political warfare been required to include good things with the bad things they know about their enemies? It would have nullified the privilege in *New York Times* v. *Sullivan*, if the *Times* had to include in its ad Commissioner Sullivan's "war-time enlistment despite his blindness in one eye . . ., his numerous professional, patriotic and charitable activities, awards and honors . . ." (Brief, p. 9).

To quibble about whether the Independent Citizens Committee, sponsor of the UN Dinner, "had never been 'designated a Communist front' " (Brief, p. 8) in the face of three references to it, including one that it was "cited as a Communist front," in the House Committee on Un-American Activities' *Guide* (Petition, pp. 11, 50), seems profitless.

Nor do Respondent's charges that Petitioner Hartnett had no right to communicate with the Chief Clerk of the House Committee (Brief, p. 10) or the New York City Police Department (Brief, p. 11), or with his clients, Young & Rubicam (Brief, p. 10) and the Kudner Agency (Brief, p. 11), all of which events came before publication of the *News Supplement* and are otherwise privileged, prove "extreme malice." Respondent was merely trying to bring other claims in by the back door as "malice," which were otherwise barred.

Respondent even argues that bringing up the seven events of 1946-9 as late as 1956, and then bringing them up only because he was a "successful candidate for office" (others with "much more substantial records" being ignored), constitutes "malice" (Brief, pp. 9-10). When people are arguing over their governors, is an intrinsically political question of suitability subject to a statute of limitations, or are there minimum limits to derelictions which can be discussed? Consider the case of Representative Samuel Stratton, a liberal Democrat from upstate New York, thought to be a strong contender for higher office. Should some officials of New York's Liberal Party be thought "malicious", when, year after year, they object to him because in 1936, at age 16, after a vacation in Germany, he wrote an article favorable to some Nazi policies for his high school paper?

The "admissions" and "acknowledgments" sprinkled through the "extreme malice" section of the Brief (pp. 7-11), when individually examined together with related testimony on the other side stand for nothing except opinion at the trial as to beliefs of six years earlier, much less "knowledge of falsity," and were generally in answer to hypothetical questions.

Respondent alleges malice in Petitioner Aware's then-president, Godfrey P. Schmidt, stating over television on June 24, 1956, after the law suit began, that the *News Supplement* was true (Brief, p. 11). Aside from the fact that his statement negates "knowledge of falsity," it is an expression of his opinion as to the *News Supplement's* truth:

> "I say that any intelligent person who is willing to put in the research and industry, can do that thing and do it competently, and we did it competently in the case of Mr. Faulk, and what we stated about Mr. Faulk was the truth and nothing but the truth" (Ex. 98, in evidence p. 5000).

Moreover, the same Mr. Schmidt was counsel who prepared the verified answers (Brief, p. 12). As to Respon-

dent's having "admitted" such truth (Brief, p. 12), see the Petition (p. 52) for the efforts of Petitioners to permit proper hearsay evidence bearing on Petitioners' reasonable belief in truth of admissions by Respondent in 1955 to Don Appell, investigator for the House Committee on Un-American Activities, of involvement with Communist fronts, and further admissions to Henry Jaffe and Bud Collyer that the items in the *News Supplement* were true, but "so what". See also the seven documents themselves (Petition, Appendix A, pp. 65-76).

Finally, Hartnett's statement to Mr. Pat Winkler of station WOR concerning possible employment of Respondent by WOR (Brief, p. 12) was in answer to Winkler's question and in itself privileged. A reading of the record, however (R. 5758-5762), indicates that the quoted words used in the Brief were only an expression of opinion at the trial half a decade later. What Hartnett actually said to Winkler was, after mentioning the law suit, a reiteration of his belief: "I personally believe that the specifications in the Aware bulletin were correct" (R. 5760).

They did not lie

To sum up this section of the Reply, Petitioners did not lie, nor did their actions amount to lying (which they take as the layman's translation of the *New York Times Co.* v. *Sullivan* rule of "actual malice": knowledge of falsity or utter recklessness; or of the reiterated rule in *Garrison* v. *La.*, 379 U. S. (1964): "Only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions.")

IV.

The question of "whether the entire common law right of action for libel should be abolished" is clearly relevant though the Court need not go so far in view of the political and public nature of this case.

Respondent contends that the only real "question presented" by petitioners is "whether the entire common

law right of action for libel should be abolished" (Brief, p. 3). Petitioners do not urge the Court to go so far, since this is not a private but a public, political case within *New York Times Co.* v. *Sullivan.*

Petitioners concede the *Sullivan* case is a *deus ex machina* to Petitioners, coming like the Eighth Cavalry to rescue the remnants of Custer's force after Little Big Horn. It is, however, like turning on the light for the first time in a room, the room being that of political free speech, and Petitioners contend that the Court of Appeals of New York erred in not applying it.

The Court of Appeals in this case is not alone in such non-application. Lower New York courts including the Appellate Division have been most reluctant to apply it at all in the reported cases which have arisen since the decision in *Sullivan.* E.g. *Dempsey* v. *Time, Inc.,* 43 Misc. 2d 754, 252 N. Y. S. 2d 186 (Sup. Ct. Trial Term N. Y. Co.), *aff'd without opinion* 22 App. Div. 2d 854 (1st Dep't 1964) (Brief, p. 15): "in [this Court's] opinion the New York Times case was limited to its specific facts, to wit, criticism of the official conduct of public officials, and did not adopt 'an absolutist view of the rights safeguarded by the First Amendment' "; *Spahn* v. *Julian Messner, Inc.,* 43 Misc. 2d 219, 250 N. Y. S. 2d 529 (Sup. Ct., Spec. & Trial Term, N. Y. Co. 1964) (injunction and damages granted against biographer in right of privacy case by Warren Spahn, the pitcher); *Harper* v. *National Review, Inc.,* N. Y. L. J. Dec. 23, 1964, p. 11, col. 2 (Sup. Ct., Spec. Term, N. Y. Co.); 33 U. S. L. WEEK 2341 (dismissal of complaint denied where facts might show that action [by plaintiff, a "world famous jurist and educator, having held academic, government and other posts", against political opinion journal] involved "private parties" and malice). But see *Schneph* v. *N. Y. Times,* Nov. 23, 1964, unreported (Sup. Ct., Bronx Co., Korn, J.) (Claim by principal attorney in city corporation counsel's office dismissed).

On the other hand the Federal courts have been willing to apply *Sullivan.* E.g. *Pauling* v. *News Syndicate Co., Inc.,*

335 F.2d 659 (2d Cir. 1964), *cert. denied* 33 U. S. L. WEEK 3245 (U. S. Jan. 18, 1965) (Judge Friendly of that Court has even criticized state-court foot-dragging when Federal questions are raised, urging "closer approach of state law to Federal law" in constitutional rights cases. New York Times, Jan. 31, 1965, p. 43, col. 3). Cf. *Smoot* v. *League of Women Voters of Grand Traverse (Mich.)* 36 F. R. D. 4 (W. D. Mich); *rev'd*, N. Y. Times, Jan. 17, 1965, § 4, p. 7 Col. 3 (6th Cir. 1964) (TV and radio political commentator dismissed suit against voter's league after district judge indicated *Sullivan* case was controlling) (see Petition, p. 59.)

So have some other state courts: *Goldmark* v. *Canwell*, New York Times, Dec. 10, 1964, p. 7, Col. 1 (Super. Ct. Seattle, Wash. 1964) (retrial ordered in case of ex-state legislator who won damages for "being linked to Communism" during primary which he lost); *Pearson* v. *Fairbanks Pub. Co., Inc.* (Sup. Ct., Alaska, 4th Jud. Dist. Nov. 23, 1964) (political columnist denied damages); *Clark* v. *Allen*, 415 Pa. 484, 204 A. 2d 42 (1964) (Senator seeking re-election denied damages) (see Petition, pp. 23-25).

What is the scope of the Court's *Sullivan* decision? The New York courts would seem to treat it as a mere shifting of a few presumptions where an old-line government official is involved. One commentator suggested it was merely a case to help out a national newspaper threatened with ruin. Note, Supreme Court, 1963 Term, 78 HARV. L. REV. 143, 204 (1964).

Petitioners suggest it is something more. Petitioners contend the Court was writing on a clean slate for political cases, and the old law of libel, spawned out of religion ("thou shalt not bear false witness against thy neighbor"), sedition laws, pre-police force public policy (relieve pressures for duelling), encrusted with the presumptions of centuries, should be considered mainly of historic interest in such cases. Petitioners urge that the Court draw the line on the basis of politics as it is today, balancing the interests in free speech and private reputation in terms of the pro-

tection each needs in the days of mass communication and a vastly increased public sector.

Petitioners contend that this goes as well for damages. The deterrent and penal-fine theory of punitive damages on its face is at war with the First Amendment in political speech cases. (See the Trial Court's view that punitive damages represent a "warning to others", 35 Misc. 2d 302, 311; Petition, Appendix B, p. 101, concurred in by the Appellate Division, 19 App. Div. 2d 464, 471; Petition, Appendix B, p. 89; see charge, Petition, p. 133). The same applies to compensatory damages, where the failure to limit the test of malice to knowledge of falsity or utter recklessness, had the fire-storm effect of a compensatory damage verdict alone of $1,000,000., with the reduction of all damages to $550,000. merely acting as a damper. It is mass prior-censorship. Respondent was permitted to run up the score.

Petitioners submit that the First Amendment should be used like a scythe on damages, to make speech on political matters no more costly in New York (damages in this case $550,000.), than in Mississippi (See *Henry* v. *Pearson*, 158 So. 2d 695 (Miss. 1963), *pet'n for cert. filed*, 33 U.S.L. WEEK 3017 (U.S. May 15, 1964) (No. 90), where $25,000. was awarded to county attorney for damages including loss of part of private law practice (See Petition, p. 25); or New Hampshire (See *Rosenblatt* v. *Baer*, 203 A. 2d 773 (N.H. 1964), *pet'n for cert. filed*, 33 U.S.L.WEEK 3235 (U.S. Dec. 23, 1964) (No. 780) where supervisor of county recreational area was awarded $30,500. for loss of income over three years).

Petitioners suggest that the true test of the *Sullivan* privilege should be whether the person concerning whom utterances are made enjoys obligatory powers at the expense of the public. If he claims damage from utterances he should not be entitled to claim damages for benefits he enjoys at the grace of the same public. (Should a union officer or radio entertainer who benefits from the government giving his station a monopoly of part of the public airwaves, receive more in compensation on an annualized

basis than the salary of any government official except the president himself, even if he is in fact damaged?)

If the Petitioners are correct in claiming that *Sullivan* was writing on a fresh slate, they also contend that this case should be heard, when the Court draws more lines on the slate. Petitioners did all they did without hope of financial gain. They thought they were acting in the public interest. (Far from "amassing" $100,000., as Respondent claimed (Brief, p. 5) Hartnett received nothing from his work for Aware; his average annual consultant income after expenses was $11,000.; he had lost all income by 1958 as a result of this lawsuit; and is now appearing as a poor person. Aware was a non-profit membership corporation a quarter of whose 300 members were AFTRA members. The late Mr. Johnson was devoting his retirement years to his ideals.)

Should respondent be correct, that he "is the victim of the most malicious and unjustified attack heretofore reported" (Brief, p. 3); should this be the hard-core political libel of all history, it should nevertheless be heard. Petitioners submit that the public and they should know for the future where the First Amendment stops. The First Amendment's limits should not be decided only on Lawrence Welk cases. It takes Lenny Bruce cases too.

CONCLUSION

For the reasons set forth herein and in the Petition, Petitioners respectfully urge that a Writ of Certioriari should be granted.

Respectfully submitted

Dated: February 9, 1965

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IN THE

Supreme Court of the United States

October Term, 1964

No. 796

AWARE, INC., a corporation, and
VINCENT W. HARTNETT,

Petitioners.

v.

JOHN HENRY FAULK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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JOHN HENRY FAULK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Status of the case

On March 1, 1965, the Court denied the Petition for Certiorari to the New York Court of Appeals filed by Petitioners in this libel case on December 30, 1964.[1]

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(1) The order of the Court read as follows:

"796 — Aware, Inc. v. Faulk. The motions of petitioners for leave to proceed without certifying the record and to dispense with printing the petition for a writ of certiorari are granted. The petition for a writ of certiorari is denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion that certiorari should be granted." As with the Reply Brief of Petitioners filed February 11, 1965, printing of this petition for rehearing has been paid for by counsel for Petitioners as a further contribution to this case, and not by Petitioners, who are appearing as poor persons.

Petitioners claimed that the $550,000 New York libel judgment[2] against them for political statements[3] about the suitability for high union office of a broadcasting entertainer (Respondent), who was an active, elected official of a union enjoying governmentally-delegated powers of compulsion under the NLRA and state law over workers and employers in the New-York-area heart of national broadcasting and over the public, violated their rights of freedom of speech and the press. They argued that Respondent's public powers, as well as his being a compulsory entertainer of the public over the radio public-utility (the airwaves being part of the sovereign property of the United States, like the tidelands), brought him within the "public official" rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, and *Garrison* v. *Louisiana*, 379 U.S. 64 (1964).

They further contended that the "actual malice" test of *Sullivan* and *Garrison* was never met, i.e. knowledge of falsity or awareness of a high degree of probable falsity. They did not knowingly lie. They considered their appeal to be vitally important to everyone's freedom of speech, since few except the richest publishers employing the most

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(2) The trial judge confirmed a verdict of $3,500,000 (the first mega-judgment in defamation) ($1,000,000. compensatory damages against Petitioners [and against a third Defendant who died before the end of the trial and whose estate settled its liability] and $1,250,000. punitive damages against each Petitioner. 35 Misc. 2d 302 (Sup. Ct. N.Y. Co. 1962) (Petition, p. 92)). These were reduced to $550,000. by the Appellate Division ($400,000. compensatory damages, together with $100,000. punitive damages against Hartnett, and $50,000. punitive damages against Aware, Inc.) 19 App. Div. 2d 464 (1st Dept. 1963) (Petition p. 82). Even as reduced to $550,000., this is the largest defamation judgment on record and in the public mind still stands for $3,500,000. *E.g.* Book rev., *Newsweek*, Nov. 16, 1964, p. 105, col. 1. The New York Court of Appeals affirmed without opinion, 14 N.Y. 2d 899 (Petition p. 79), except to state that it had passed on contentions raised under *New York Times Co.* v. *Sullivan*, 14 N.Y. 2d 954 (1964) (Petition, p. 77). Petitioners have contended that Respondent's damage, if any, came not from them but because his involvement in this well-known law suit scared off sponsors.

(3) *I.e.*, that Respondent had been involved with Communist-front activities.

specialized and skilled writers can afford the risk of a huge libel suit, much less damages such as these. Petitioners, who were unpaid and have lost everything as a result of this case, have characterized themselves in the Petition as pamphleteers who acted from patriotic motives.

Respondent limited his brief in opposition, served January 27, 1965, to denying the "public official" argument, asserting that the alleged libel was purely private and that there was deliberate malice (i.e. bad motives), and to stating that the only real question presented was "whether the entire common law right of action for libel should be abolished" (Brief, p. 3).

In this petition for rehearing Petitioners under Rule 58(2) are presenting three independent grounds for rehearing, two (Points I and III) based on intervening circumstances of substantial effect, and one (Point II) based on other substantial grounds available to Petitioners although not previously presented.

I

The nascent conflict between states in the South (or New York in the *Aware* case) and those which follow the spirit of *Sullivan* and *Garrison* has culminated in the Kuchel California criminal libel case brought by a powerful senator against four opponents, which affirms the need to extend the new rule to opinionated pamphleteers as well as mass media.

The intervention of the Kuchel case

In another of the incredible coincidences which have dogged Petitioners during the nine years of this case, the California criminal libel case involving Senator Thomas H. Kuchel was made public on February 18, 1965, during the very week that the Clerk distributed the Petition for Certiorari and other papers in this case to the Court for consideration.

The Kuchel case is an intervening circumstance of substantial effect, because of its possible influence on the Court when it was made public, because it cumulates with this case

to cast a pall of fear over the opinionated, and because it exacerbates the false distinction which Petitioners claim appears to have been made between institutionalized mass media such as newspapers and the individual who pamphleteers. (Since the case involves criminal libel, the morganatic father of civil libel, light shed on one is equally shed on both, the law raised in this Point I reinforcing the argument in independent Point II.)

The Kuchel case and why serious defenses to it make it seem oppressive

Petitioners do not want to try out the Kuchel case (with which they have no connection) but consider it important to point out to the Court why their assault on that case, as one which cumulates with theirs to threaten free speech, is justified.

A copy of the indictment in the case (*People* v. *Capell*, No. 300577, Super. Ct. Los Angeles Co. Calif. Feb. 17, 1965) is set forth as an Appendix.[4] There are four defendants. Two are former policemen; one allegedly in 1964 made an affidavit, which is charged as being libellous, that he had arrested Kuchel one night in 1950 while he was engaged in a low act. A third defendant is a public relations man, and the fourth, Capell, is publisher of the *Herald of Freedom*, an opinionated newsletter which opposes communism and sexual derelictions. The indictment accuses the four of "defaming in writing the honesty, integrity, virtue and reputation" of Senator Kuchel, by circulating the affidavit, which the district attorney's investigation determined to be false.

One may well sympathize with the plight of a distinguished Senator known to be dedicated to his ideals and with a high personal reputation, and ranking among the mighty as minority whip of the Senate, if a deliberately false lie about his behavior is widely circulated among the public. He might do a number of things. He might ignore

(4) The facts on the case in this Point I are taken from the Los Angeles Times, Feb. 18, 1965, p. 1, col. 5; Feb. 19, Part II, p. 1, col. 5; Mar. 4, Part I, p. 2, col. 5; Mar. 5, Part I, p. 2, col. 5; Mar. 7, Sec. B, p. 8, col. 1.

it. He might publicize the district attorney's investigation, either in a news release or in the *Congressional Record*. His position gives him a call on the ear of most of the nation and all of California. He might demand a retraction. He might sue for civil libel. To do what he did do, however, despite the circumstances, in using the discredited remedy of criminal libel, originated to punish treason in the later days of the Court of Star Chamber, should give one the most serious pause. This is the more true when he is one of the most powerful men in the United States and his enemies men of no power at all, and the remedy is usually thought of as a weapon used by men of power against their opponents.

The defendants have available serious law and fact defenses. They may attack the cause of action itself, saying that the absence of a test of intent in criminal libel, so liability is automatic, violates the establishment clause of the first amendment (the same argument made by Petitioners in Point II of this Petition) in establishing a religious concept of sin as the boundary line between defamation and no defamation in the courts. They may also urge *Garrison* to upset the California law which puts on the defendant the burden of proving truth with good motives (Penal Code, Sec. 249) and of rebutting presumed malice (Sec. 250; see *People* v. *Hewlett*, 108 Cal. App. 2d 358, 239 P.2d 150, *cert. denied*, 343 U.S. 981 (1952)). Moreover, although someone did his homework and read *Garrison* (said the complainant: "This case drips with malice." *Newsweek*, March 8, 1965, p.24, col. 1), the prosecution would seem hard put to prove malice under *Garrison* when three of the defendants relied on the affidavit of the fourth, a former policeman, as to official acts he himself performed. The policeman himself, at latest word, had only admitted to doubts about the identification, after being confronted with photos and fingerprints taken after the 1950 arrest. A further defense of law may be made: the defendants may contend that the conduct ascribed to the Senator was not criminal, so that to the extent the indictment (alleging a defaming of his "honesty, integrity") charges that the affi-

davit imputed criminal conduct, there might be no libel to that extent.[5]

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(5) A false charge of crime defames in two ways: it attacks one's honesty as well as virtue. If the crime can be shown as non-existent or unconstitutional (see the following argument), the "honesty" defamation may fall. Cf. *Pollard* v. *Lyon*, 91 U.S. 225 (1875) (error to S. Ct. of D.C.) (a slander case; words held not actionable per se because fornication charged was not indictable offense).

With the application of the establishment clause to the states, it may now be urged that the act (homosexuality) charged in the affidavit is no longer constitutionally criminal. Advanced legal and sociological commentators have long suggested that such conduct in private between consenting adults should be left alone. This is now the view of the 1961 revision of the Illinois Penal Code, the proposed revision of the New York Penal Law and the Model Penal Code. The Wolfenden Report (Report of the Comm. on Homosexual Offenses and Prostitution, Home Office 1957) lists France, Italy, Spain, Belgium, Netherlands, Norway, Sweden and Denmark as treating such conduct as non-criminal; it is still a crime in England but prosecutions have been centralized in the Home Office and have practically ceased.

Such conduct is a crime in California, under CAL. PENAL CODE §§ 286 and 288a, derived by successive reenactments (which looked to the common law, *People* v. *Smith*, 117 Cal. App. 2d 698 (1953); *People* v. *Ragsdale*, 177 Cal. App. 2d, 676 (1960)) from the common-law statutes of 25 Hen. 8,c. 6 (1533) and 5 Eliz. 1, c. 17 (1562). These were taken over directly from the canon law which theretofore solely governed the offense: II Gratian's Decretals, Cause XXXII, Question 7, Canon 13 (1140 A.D.), based on the Law of Holiness given by God to Moses, Leviticus 20:13. For the same reasons suggested with respect to the unconstitutionality under the establishment clause of libel law fictions and presumptions based solely on the recognition of a religious sin jurisdiction and to supplement those reasons (See Point II, *infra*) it is submitted that unless there is a good reason for banning conduct, for a state to treat it as a crime is unconstitutional. All morals or sin are not here being attacked, only those utterly without a basis in reason.

Over the millenia no better reason has been given than that most people do not like the conduct in question, because Moses preached against it; a rationalization is that it threatened procreation among his people. Henry VIII's reception of the crime from the canon law was not based on public policy but was part of his seizure of control of the Church in England and part of a centuries-long process of reception of much of canon law by the common law. By contrast public policy may well have motivated the reception of the canon law of witchcraft. 33 Hen. 8, c. 8 (1541) because witches might threaten the peace. Nor was the canon law interested in public policy: "The function of the ordinary ecclesiastical courts was to punish offenses against religion and morals, in a word to punish sin as such", 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 436 (1883); for the history of this reception, see 2 *id.* 429 *et seq.*

Other defenses can be made. Did the policeman make an honest mistake? Were the photos and fingerprints taken in his presence? Was Capell as a member of the press (though the *Herald of Freedom* is mimeographed) entitled to the privilege of honest mistake under *Sullivan* in publishing allusions to what he probably thought was a scoop? Was he privileged in giving a copy of the affidavit to a Senate sub-committee counsel?

The factors in the case make it seem so out of line with the purifying thrust of *Sullivan* and *Garrison* that its institution appears to flout the authority of this Court.

The effect of the Kuchel case on the Court

Petitioners are fearful that the intervention of another libel case of such prominence and such nasty subject matter while the Petition in this case was being read may have unduly influenced the Court. Petitioners therefore respectfully urge that if there is any basis for their fear, this case be reconsidered now that the initial shock the criminal libel case may have caused has passed.

To the threat to free speech from New York's foot-dragging, and the South's disregarding of the spirit of *Sullivan* and *Garrison*, has now been added California's open flouting of the Court, at a time when other states follow the new spirit

Petitioners pointed out earlier (Petition, pp. 58-9; Reply, pp. 19-20) that the states have been in conflict as to how far to follow *Sullivan* and *Garrison*. Many follow those cases. New York's attitude seems to be that the new rule could not have been meant for it; in other states, as now in California, the issue flips over to malice, as the concurring opinion of Mr. Justice Douglas in *Garrison*, 379 U. S. at 81, feared would happen. (Petitioners are analogizing a conflict of state courts on Bill of Rights questions affecting the states to a conflict of circuits in ordinary federal questions as grounds for a grant for certiorari and for rehearing under Rule 58(2). If the real damage to be done by a case comes when a district attorney in dead earnest puts on a show

trial, it is submitted that the conflict exists at that stage, regardless of what happens when the case gets to the state's highest court.)

When the Petition for Certiorari was being considered the Court may not then have felt that the conflict was serious enough to call for another pronouncement to protect the pamphleteer. Taken alone the *Aware* case may have been considered by the Court (or even by some outspoken liberals or conservatives most likely to be affected) as a sport. It might have been reasoned that it was merely a coincidence that a political libel case should combine the elements of a solvent defendant (whose estate settled his liability), a well-known plaintiff, trial in a politically hostile jurisdiction, famous but irrelevant witnesses, and a jackpot verdict. A twin double is unlikely to recur; if it does, why, there are *Sullivan* and *Garrison*. Other persons with opinions to express, however, have been chilled by the *Aware* case's implications for speech and the press. Yet so far these implications have been treated as fissionable material in too small quantity to reach the critical stage.

The intervention of the Kuchel case, however, which was blazed across the public consciousness, has now put the nuclear mass past the critical stage. Of what concern to lawyers whose appetites have been whetted by *Aware* and *Butts*[6] are *Sullivan* and *Garrison*, when *Aware* is allowed to stand and a state blatantly dusts off *criminal* libel? To even the most "it-can't-happen-to-me" opinionate, the threat is now clear: to the possibility of huge civil damages has now been added the danger of corporal punishment and the disgrace of conviction. The day of political oppression for unpopular views is at hand.

Lawrence Welk and Lenny Bruce (the nice malice of Fleet Street versus the nasty malice of the pamphleteer): you believe what you want to believe

Institutionalized mass media, newspapers like the Laconia Evening Citizen (the newspaper which published the

(6) *Butts* v. *Curtis Pub. Co.* (Petition, p. 55; Reply, p.2 n.2) (verdict $3,060,000.; judgment $460,000.).

libel in *Rosenblatt* v. *Baer, cert. granted,* 33 *U. S. L. Week* 3306 (U. S. Mar. 15, 1965) (No. 780) (see Point III, *infra*)), and the New York Times, and other media such as the Associated Press and the National Broadcasting Company, have an aura of good faith and responsibility about them. Petitioners recognize that they should be protected. The issues they pick are respectable ones: raiding the public till in *Rosenblatt*, excessive police pressure in *Sullivan*, whether General Walker incited a riot in Mississippi in the Associated Press case (Petition, p. 58), or whether the FBI arrested fences selling guns to the Birch Society in the NBC case (Petition, p. 59). (Even in *Garrison* the libel was white-collar: were judges corrupt and too lazy to keep up with their calendar?) *Sullivan's* test of malice is not hard to apply. Even if a reporter believed what he wanted to believe, his honest professional mistake will now relieve a conventional political libel.

What the Kuchel case now emphasizes is the malice problem posed by *Aware*. What about the pamphleteer and the red-meat libel? Is the pamphleteer less socially useful than mass media? Petitioners believed what they wanted to believe, too. Petitioners had substantial backing for their belief that Respondent had participated in communist-front activities. They thought the public should know what they had learned about a powerful man in whom the public had a legitimate interest. He was as booted and spurred with government power to ride on their backs as Jefferson's nobleman. Their fall came when they were not allowed to show what they had relied on and were held to an impossible test of truth. Ought not what they had learned come out? Ought not the accusation in the Kuchel case have come out? The policeman did not make up his accusation. One of the men arrested in 1950 told him he was Kuchel. (Grand jury testimony was that he was from Kuchel's staff.) If the conduct in question can give rise to blackmail, is it not relevant to the discharge of a public official's responsibility? Had the accusation not been made public in 1964, might it not have simmered and perhaps boiled up in worse form later?

Petitioners contend that the pamphleteer performs as valuable a function as institutional mass media. In a day of commonthink, of one-paper cities, of one radio or TV station in some places, a day when only those are heard on mass media who have passed a threshold of acceptability or popularity, the pamphleteer is a source of new political ideas and a means of communication among those who do not conform and otherwise might be alienated from society. (Whether *A Texan Looks at Lyndon*[7], the epitome of the modern political pamphlet, sold seven million copies or only three in 1964, it evidently filled a void left for many by the mass media.)

The cases beginning with *Sullivan* and including *Garrison* (and now *Rosenblatt*) apply the first amendment to mass media. Petitioners ask that it also be applied to the opinionated individual and the pamphleteer.

II

Because the cause of action of libel itself makes liability automatic without permitting proof of intent for no other reason than a continuing respect for the sin jurisdiction of the Church and its courts, it is as much a violation of the establishment clause as prayer in public schools.

As an independent, substantial ground under Rule 58(2) of the Court, Petitioners ask the Court to apply the establishment clause of the first amendment to the law of libel. Petitioners have standing to raise this ground for several reasons. First, Respondent has raised the overall question (Petitioners believe that it was done most seriously) of whether the common-law action of libel should be repealed (Brief, p. 3). Second, Petitioners contend that, the Constitution being a growing thing, the freedom-of-speech clause itself (already before the Court in this case) has in the comparatively a-religious present era sufficient breadth to do the work of the establishment clause as if the estab-

(7) J. Evetts Haley, Palo Duro Press, 1964.

lishment clause were not there. Thus an establishment clause argument is really a freedom-of-speech clause argument; the latter could ban prayer in public schools and irrational rules in libel cases, as well as the former. Therefore Petitioners contend that the argument which follows is properly before the Court.

Far from asking the Court to abolish the common law of libel Petitioners are only asking that it be purified of unconstitutional foreign bodies.

Automatic liability in the law of libel violates the establishment clause of the first amendment

The basis for automatic liability in libel is not logic, it is not public policy, it is not even history; it is religion and it is sin.

A long-standing presumption in the law of libel, both criminal and civil, has been that if written matter is defamatory, a cause of action has been automatically made out. This is true regardless of whether a defense of truth or privilege can be made out. This presumption, making the damage and not the intent the cause of action, has been universally critized: "No branch of the law has been more fertile of litigation than this (whether plaintiffs be more moved by a keen sense of honour, or by the delight of carrying on personal controversies under the protection and with the solemnities of civil justice), nor has any been more perplexed with minute and barren distinctions . . . The law went wrong from the beginning in making the damage and not the insult the cause of action." POLLOCK, TORTS, 243, 249 (13th ed. 1929).

Petitioners contend that the law did not go wrong. It knew very well what it was doing, and what it was doing was recognizing the role of the established religion in punishing the sin of defamation in the canon law courts, which existed side-by-side with the common-law courts.

History of the law

The prevailing view has been that the action of libel, as we now know it, both civil and criminal, originated in a

criminal case, *De Libellis Famosis*, 5 Co. Rep. 125a, 77 Eng. Rep. 250 (Star Ch. 1605), borrowed from the Roman civil law against anonymous written pasquinades or broadsides, enforced by the Court of Star Chamber, and designed to punish sedition in written form (the case involved a verse about the Archbishop of Canterbury[7a]). Since the rule was designed to preserve the ruling oligarchy's power, liability was intentionally automatic, and the only allowable defense was unqualified submission or other proof of loyalty. (Pleading truth would be considered contemptuous conduct.) In time truth with good motives came to be a recognized defense, but the gist of the action remained the same. When the courts extended the wrong to cover private tort actions (to relieve pressures for duelling before the modern police system), it simply carried over its rules for criminal cases. See *Restatement, Torts* § 568(b) (1938).

Yet at the time this was going on, there was a perfectly good remedy *in esse* for defamation available to the common law. The common law might have taken over all defamation from the canon law. It should be recognized that for a thousand years prior to 1600 the law affecting almost all Western Europeans consisted of the canon law of the Church (affecting all conduct of baptized persons) and the temporal law (affecting transactions, breach of the peace and relationships to temporal sovereigns). The temporal law on the continent was the Roman civil law; in England it was the common law. Enforcement was impartial: the bishop's jails were as strong as the king's; his fires killed as well as the king's noose. The two systems were like federal and state law in the United States.

The two systems of temporal and church courts did not live together too happily, but conflict only came at the edges, each respecting the other's basic jurisdiction. The prevailing view of slander affords an example of the relationship. All defamation, spoken or written, being a sin, was cogni-

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(7a) The prelate's overlapping temporal role may explain why the case arose in a temporal court (Star Chamber) instead of the church Court of High Commission or a lower ecclesiastical court.

zable by the Church courts.[8] Only those portions of it which threatened a breach of the king's peace (a sort of commerce clause of its day) could originally be tried in England in the King's courts of common law.[9] Those slanders which were thus temporally cognizable have come down as actionable per se to the present: imputation of crime, loathsome disease, business misconduct, and unchastity.

Although the Reformation in England continued the church law and church courts' separate jurisdiction until 1640, when the power to inflict corporal punishment was practically removed though the courts still retained much of their power, the transfer of jurisdiction over offenses went on more quickly until all slander where there is any pecuniary damage is now actionable. But what about the rest of defamation, insults not causing money damage which might cause the loss of friends, or mental distress, or illness? What about the canon law rule on writings? Why was much of defamation left in the church courts, where it still exists in limbo (in England the church courts lost their jurisdiction only in 1855, 18 & 19 Vict., c. 41). Why did the common-law courts borrow from the law of treason when they came to provide a civil remedy for written defamation?

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(8) II Gratian's Decretals, Cause V, Question I, Canons 1 and 2 (1140 A.D.).

(9) Local manorial and shire courts had once handled both written and verbal defamation, but not the king's courts, so that once the church courts took over all defamation and the local courts decayed, the king's judges had to use fictions to be able to punish defamation at all. 1 Pollock and Maitland, *History of the English Law* 130; 2 *id.* 538 (2d ed. 1911). The true view of defamation, therefore, is that there is an overall common-law action for defamation, with proper rules in harmony with those of other crimes and torts, but it has been in a state of suspended animation for a long time because of the establishment of a sin jurisdiction which American courts still unconstitutionally recognize. A proper common-law action for defamation would require proof not only of a false written or verbal statement, but also proof by the complainant that there was also intent to lie. It is this latter ingredient whose absence is harmful to defendants; the obstacle to requiring such an ingredient today is the insistence of courts on honoring statutory or present-day common-law views which perpetuate the notion that a portion of defamation is in the cognizance of religion and the courts cannot invade religion's province.

The answer is that the common-law courts and lawyers of the period had a healthy respect for both the church courts and their preachings on sin. Englishmen's lives were permeated with religion. For the common-law courts there would be no question of infringing on the province of the divines, by taking over full jurisdiction over verbal or written defamation. Instead, their respect for the church and their own beliefs brought them to conjure up fictions (i.e., temporal damage in verbal, and automatic liability carried over from criminal libel, in written defamation). By 1812 in England, Sir James Mansfield, who had no establishment clause to bother him but who no doubt respected the established church, decided that the rules were too well established to change. *Thorley* v. *Lord Kerry*, 4 Taunt. 355, 128 Eng. Rep. 367 (Ex. Ch. 1812).

The problem today

Thus today, instead of a pure remedy in either civil or criminal defamation, in which a cause of action can be made out only if intentional or negligent misconduct is proved, the concept of sin has produced a situation which baffles courts and lawyers and in this case has worked a terrible wrong on petitioners. (Petitioners were never allowed to show their intention, they were hobbled in showing reliance on others: they were held to an absolute liability and in proceedings resembling those of the later days of the Star Chamber were held to an impossible test of truth.)

Is such deep-freezing of sin an establishment of religion in violation of the First Amendment? Petitioners contend that it is. Religion is not limited to devotion and prayer. Religion has always sought to govern all kinds of conduct.[10] Where there is no reason other than a religious one for a particular proscription, it is submitted that continuation of such a proscription is as much an establishment of religion as forcing a prayer on school children. Ninety percent of the people may want to continue prayer in the schools:

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(10) One may see a recent temporal example in the meeting of churchmen in Washington, D. C on March 14, 1965, to urge the dispatch of Federal troops to Selma, Ala., to compel faster voter registration. N. Y. Times, March 15, 1965, p. 1, col. 8.

ninety percent may want automatic liability in defamation, yet without a rational basis, each amounts to an establishment of religion, by imposing either devotion or a concept of sinfulness. What need have bishops to fill their cathedrals to teach conduct demanded by the Bible, when the law does it for them? The Church of England is in fact established in the courts of America.

This argument is in no way in conflict with the Court's opinion in *School District of Abington* v. *Schempp*, 374 U.S. 203, 303 (1963): "the 'Establishment' clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions," (or "activities which, though religious in origin, have ceased to have religious meaning"). What petitioners contend is that where the only reason for a proscription is a religious one, and there has been no intervening rational or public policy basis for it (automatic liability in defamation has never had a nice word said about it), the views of a religion, or to put it more bluntly the views of some people, are being inflicted on all. Not only is it a violation of the establishment clause, but it is a violation of the "freedom-of-speech" clause as well, since one man's establishment is a limitation of another's freedom of speech.

If Petitioners are right in their contention that the establishment (or freedom-of-speech) clause can excise the automatic liability rule of the defamation cause-of-action, the Court need not go on cutting Gordian knots.[11] Instead it will have achieved the Nirvana of commentators on the law of defamation: the absurdities of centuries will go, the law of defamation will be free to grow naturally, and in defamation as in other crimes and torts intent will be the gist of the cause of action.

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(11) What *Sullivan* and *Garrison* did for political libel the establishment clause can do for the rest of defamation. With defamation freed of its irrational matrices, it can grow naturally; the state courts will be free to fashion the remedy so as to be fair to defamer and defamed alike. Even in non-damage cases the courts might be able to compel publication of apologies and retractions. This would reduce the pressure on the Court to right ghastly wrongs such as *Sullivan* and *Aware*.

III

A further intervening circumstance of substantial effect is the grant of certiorari on March 15, 1965 in *Rosenblatt* v. *Baer*, raising the issue whether a titular public employee (recreation area supervisor) is within the scope of "public official" under *Sullivan* and *Garrison*, but leaving open the issue whether a non-titular quasi-public official exercising federally-delegated NLRA union powers is included.

Should the Court decide in *Rosenblatt* v. *Baer*, *cert. granted*, 33 U.S.L. WEEK 3306 (U.S. Mar. 15, 1965) (No. 780) that respondent in that case, Baer's, employment as supervisor of a ski-resort recreation area made him a "public official", it would seem to be placing form over substance, if at the same time Respondent union-official in this case, with his NLRA-delegated powers and compulsory public-utility relationship with the public as a broadcaster, is not considered a "public official".

Scope of "public official"; the "title" argument

The fact is that almost any group of citizens in some states can set up a state-chartered district for almost any purpose. The newspapers are full of a story of how real estate promoters in California got a family with a large farm to set up a local improvement district which then floated $500,000 of bonds in Wall Street to put in roads and sewers. (So far no lots have been sold and the interest is in default.) There are other stories of people setting up what amounts to their own country club as a public improvement district.

Petitioners do not oppose such extension of public activities. It would seem, however, to carry the notion of "public official" to an extreme, if his title, the geographic scope of his powers, and an almost fictitious connection with government is the test of whether he may be criticized with impunity under *Sullivan* and *Garrison*, and not the substance of his actual powers. There is little difference be-

tween the public "recreation area" ski-resort in *Rosenblatt* and a private ski-resort, whether non-profit, profit-making or even money-losing. Whether public or private, it provides a good salary for someone and business for local merchants. A private ski-resort whose owner wishes to retire might even be sold to a new "recreation area" so that local merchants will continue to have good business.

The "delegated powers" argument; a "non-geographical" test

By contrast, Mr. Hoffa, whose NLRA-empowered Teamsters Union has 1.4 million members, or Mr. McDonald (or Mr. Abel) whose Steel Worker's Union has six hundred thousand members, or Messrs. Huntley and Brinkley, who are enabled by a government public-utility to monopolize a radio or television channel, though their powers are nationwide, may not be criticized with like impunity, if form and not substance is to govern.

Petitioners submit that Respondent's delegated NLRA powers as AFTRA Vice President, powers over the national heart of radio and television out of all proportion to the AFTRA Union's 4,000 members, clearly bring him within the *Sullivan* and *Garrison* rules. Moreover, his role as a regular broadcaster over the governmentally-imposed radio monopoly gave him even more compulsory powers over the public whose air waves he legally pre-empted for his own profit. His public powers (nationwide in scope) were many times greater than Baer's as supervisor of a public ski-resort in the *Rosenblatt* case.

Petitioners see little difference in the malice aspects of the case. (The Appellate Division was morally righteous in tone, while the New Hampshire court was clinical, but that is the difference between Sarah Bernhardt and Eleanora Duse, or David Susskind and Edward R. Murrow.) The petitioner in *Rosenblatt* seems to have been a cantankerous, unpaid newspaper man (with warm friends and annoyed enemies) who was warring for his conception of the public good, whether it meant his victim would lose his public job or not. His words probably reached a far higher proportion of the people who might employ the

ex-supervisor than did Petitioners' through the *Aware News Supplement.*

For the Court now to extend *Sullivan* to other nominally public officials, yet leave open or in conflict the question of extending it to those holding non-geographical government power through delegation, or to those granted monopoly powers under a public-utility law, would seem to leave unsettled a large area of free speech. With the pervasive growth of the public sector geographically (to include even a ski-resort) as well as non-geographically, the need of the public to know how far its speech on public matters may go is great. To delay a pronouncement in face of the continuing acceleration in growth of the public sector is to leave a pall of fear over the public as a whole and especially that political faction whose views happen at any given moment to be out of fashion.

Petitioners suggest that the Court has before it the two logical directions for extending *Sullivan* and *Garrison: Rosenblatt* v. *Baer* deals with the person who, regardless of how little his powers are, is by title a public official; Petitioners' case deals with the person who regardless of his title wields very substantial powers delegated by government. For the Court to decide one without the other is to leave a void as great as the one it fills.

CONCLUSION

For the reasons set forth herein Petitioners respectfully urge that this Petition for Rehearing and the Petition for Certiorari be granted.

Respectfully submitted,

Dated: March 25, 1965

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APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

FRANCIS A. CAPELL, JACK CLEMMONS, JOHN F. FERGUS, and NORMAN H. KRAUSE,
Defendants.

S. C. No. 300577
D. A. No.

INDICTMENT

CONSPIRACY TO VIOLATE SECTION 248, SECTION 650 1/2, and SECTION 182, SUBD. 1, PENAL CODE

The Grand Jury of the County of Los Angeles, State of California, hereby accuses FRANCIS A. CAPELL, JACK CLEMMONS, JOHN F. FERGUS, and NORMAN H. KRAUSE of a felony, namely, CONSPIRACY TO VIOLATE SECTION 248 and SECTION 650 1/2 and SECTION 182, Subdivision 1, of the Penal Code of the State of California, which said conspiracy is in violation of Section 182 of said Penal Code, in that on or about and in the month of May, 1964, and continuously thereafter, to and including the 17th day of February, 1965, the above named defendants, together with other persons whose true names are unknown to the Grand Jury, did, at and in the County of Los Angeles, State of California, wilfully, corruptly, and feloniously conspire, combine, confederate, and agree together and with said other persons to

First, maliciously defame by and in writing the honesty, integrity, virtue, and reputation of United States Senator Thomas H. Kuchel and did thereby expose said United States Senator Thomas H. Kuchel to public hatred, contempt, and ridicule, in Violation of Section 248 of the Penal Code of the State of California;

Second, use the name of United States Senator Thomas H. Kuchel wilfully and wrongfully in a manner that will and did affect and did have a tendency to affect his moral repu-

tation generally and in the estimation of the person and persons to whom it was so used, in Violation of Section 650 1/2 of the Penal Code of the State of California;

And further that said defendants, FRANCIS A. CAPELL, JACK CLEMMONS, JOHN FERGUS, and NORMAN H. KRAUSE, and other persons whose true names are unknown to the Grand Jury, did by themselves individually, and with the others in fact maliciously defame, by writing, the honesty, integrity, virtue, and reputation of United States Senator Thomas H. Kuchel, and did thereby expose United States Senator Thomas H. Kuchel to public hatred, contempt, and ridicule in Violation of Section 248 of the Penal Code of the State of California.

And further that said defendants, FRANCIS A. CAPELL, JACK CLEMMONS, JOHN FERGUS, and NORMAN H. KRAUSE, individually, and with others did wilfully and wrongfully use the name of United States Senator Thomas H. Kuchel in a manner that will and did affect and did have a tendency to affect his moral reputation generally, and in the estimation of the person and persons to whom it was so used, in Violation of Section 650 1/2 of the Penal Code of the State of California.

Pursuant to said combination, confederacy, agreement, and conspiracy to carry out the objects and purposes of the same, the following overt acts occurred in the County of Los Angeles, State of California:

OVERT ACT No. 1 — On or about the 15th day of May 1964 there occurred a conversation between the defendants NORMAN H. KRAUSE, JOHN F. FERGUS, JACK CLEMMONS, and FRANCIS A. CAPELL.

OVERT ACT No. 2 — On or about the 25th day of May 1964 there occurred a conversation between the defendants NORMAN H. KRAUSE, JOHN F. FERGUS, JACK CLEMMONS, and FRANCIS A. CAPELL.

OVERT ACT No. 3 — On or about the 3rd day of June 1964 there occurred a conversation in the presence of Amy N. Robertson by the defendants NORMAN H. KRAUSE and FRANCIS A. CAPELL.

OVERT ACT No. 4 — On or about June 3, 1964, the defendant NORMAN H. KRAUSE, at the request of the defendant JOHN F. FERGUS, did sign an affidavit which was notarized in the presence of Amy N. Robertson, and said notarized affidavit was taken into the possession of defendant JOHN F. FERGUS.

OVERT ACT No. 5 — On or about September 15, 1964, there occurred a conversation by defendants FRANCIS A. CAPELL and JOHN F. FERGUS with one John Dickey.

OVERT ACT No. 6 — On or about September 15, 1964, the defendants FRANCIS A. CAPELL and JOHN F. FERGUS did deliver a certain affidavit to one John Dickey.

OVERT ACT No. 7 — Some time following the date of June 3, 1964, and on or about June 15, 1964, said defendant JOHN F. FERGUS did send the affidavit of June 3, 1964, executed by defendant NORMAN H. KRAUSE, to the defendant FRANCIS A. CAPELL.

[*Witnesses, Certification and Filing Data omitted*]

CERTIFICATE OF COUNSEL UNDER RULE 58(2)

The undersigned, Counsel for Petitioners, does hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58(2).

Dated: March 25, 1965

HENRY S. MIDDENDORF, JR.,
Counsel.